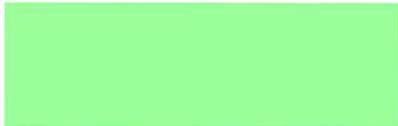


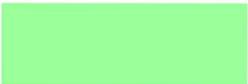
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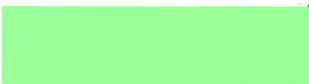
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



Date: **DEC 09 2013** Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A).

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an “alien of extraordinary ability” in the arts, specifically as an actress, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien’s “sustained national or international acclaim” and present “extensive documentation” of the alien’s achievements. See section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, the petitioner asserts that the director erred in concluding that she did not perform in a leading or critical role for organizations or establishments with a distinguished reputation. The petitioner further asserts that she can establish eligibility for two additional regulatory criteria not previously claimed and submits new evidence relating to the additional criteria.

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien’s entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. See H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term “extraordinary ability” refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien’s sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO’s decision to deny the petition, the court took issue with the AAO’s evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent “final merits determination.” *Id.* at 1121-22.

The court stated that the AAO’s evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that “the proper procedure is to count the types of evidence provided (which the AAO did),” and if the petitioner failed to submit sufficient evidence, “the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded).” *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

A. Prior O-1 Nonimmigrant Visa

While U.S. Citizenship and Immigration Services (USCIS) has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased,

¹ Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

standard. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, USCIS approves some nonimmigrant petitions in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The language found in 8 C.F.R. § 214.2(o) (outlining the requirements to be classified as a nonimmigrant alien of extraordinary ability or achievement) describes aliens who have a demonstrated record of extraordinary achievement in the motion picture or television industry. The criteria for meeting the definition for the parallel *immigrant* classification under 8 C.F.R. § 204.5(h)(3)(i), however, differ from those relating to the nonimmigrant O-1 classification.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). USCIS need not treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

B. Evidentiary Criteria²

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 204.5(h)(3)(i).

The petitioner previously submitted evidence under this criterion. The director's decision concluded that the petitioner did not meet this criterion and the petitioner does not identify any factual or legal error relating to this criterion on appeal. Consequently, USCIS concludes that the petitioner abandoned this claim. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall

² The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

include the title, date, and author of the material, and any necessary translation. 8 C.F.R. § 204.5(h)(3)(iii).

The director determined that the petitioner established this criterion. To satisfy this criterion, the petitioner submitted multiple articles from Italian magazines and other media, with accompanying translations in English. The regulation at 8 C.F.R. § 103.2(b)(3) states: "Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English."

While not addressed by the director in his decision, the petitioner submitted translations that do not comport with the regulation. Instead, the translations are accompanied by a single blanket certification that does not identify the specific translations certified. Because these translations do not comply with 8 C.F.R. § 103.2(b)(3), they have no probative value.

Accordingly, the petitioner has not satisfied the regulatory requirements and the AAO withdraws the director's finding with regard to this criterion.

Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iv).

The petitioner did not submit evidence in support of this criterion with her Form I-140 or in response to the director's Request for Evidence (RFE). Rather, the petitioner submits new evidence relating to this criterion for the first time on appeal. The director, in the RFE, specifically noted that the petitioner did not submit evidence under this criterion and informed the petitioner that she could choose to submit evidence in response to satisfy the request. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner in her letter responding to the director's request stated the following: "in the USCIS RFE letter, all the additional evidence requested (except for the Award LOS ANGELES ITALIAN FILM FESTIVAL for which I am submitting new info/magazine), I without a doubt already submitted in the initial I-140 application in detail and with thorough explanation for each subject."

As in the present matter, where a petitioner was on notice of a deficiency in the evidence and had an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The response to the director's RFE was the petitioner's opportunity to document her participation as a judge of the work of others. *See id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the new evidence submitted on appeal.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field. 8 C.F.R. § 204.5(h)(3)(v).

The petitioner addresses this criterion for the first time on appeal, referencing her fundraising work without explaining its impact on her field of acting. As noted above in the discussion of the previous criterion, the director noted in the RFE that the petitioner had not submitted any evidence for this criterion and she declined to submit evidence in response to the RFE via her response letter. Again, where a petitioner was on notice of a deficiency in the evidence and had an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N at 764; *Matter of Obaigbena*, 19 I&N at 533. The response to the director's RFE provided the petitioner an opportunity to document evidence of original artistic contributions of major significance in the field. *See id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the new evidence submitted on appeal.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii).

In general, a leading role is evidenced from the role itself, its duties, and how it fits within the hierarchy of the organization or establishment. A critical role is one in which the petitioner positively impacted the success or standing of the organization or establishment.

The director determined that the petitioner did not satisfy the plain language requirements of this criterion. The director observed that while the petitioner submitted various documentation in support of this criterion, including printouts from the internet, articles, and letters of support as evidence of the petitioner's performance of various leading or critical roles in television, film, and theater, such a level of involvement does not constitute a leading or critical role in an organization or establishment with a distinguished reputation. In addition, the director determined that an acting role played in a television show, movie, or theatrical endeavor would generally not qualify as a leading or critical role and noted that the previously issued RFE suggested that the petitioner submit evidence that would assist in establishing that she performed a leading or critical role for organizations or establishments.

On appeal, the petitioner asserts that the record contains substantial and detailed evidence for nine different large and reputable organizations in Italy where she played an important role as a starring actress and that the director only discussed the sufficiency of evidence relating to one of the nine organizations. As an initial matter, the record indicates, and the petitioner only identifies eight organizations for which she performed in various leading and critical roles as either a leading actress or a spokesperson.

In the initial application, the petitioner largely asserted that she performed in a leading role by performing as a leading actress in various acting projects, such as plays, movies, and television shows. The petitioner also identified a commercial for a beauty line [REDACTED] which resulted in successful sales on a retail satellite television platform. On appeal, the petitioner for the first time asserts that her leading role for various individual acting projects amounts to a leading or critical role for the corresponding television networks, theaters, musical theater company, online television network, and cosmetic care company. As stated by the director, the individual acting projects (such as a movie or a

theater production) are not the equivalents of organizations or establishments. While on appeal the petitioner now characterizes her leading involvement in individual acting projects as work that impacted the entire producing network or theater, the record does not support such a claim. For each claimed leading role, the petitioner submitted a packet of evidence that generally included documentation of her involvement, magazine articles, web references, and a letter or two from an individual who was involved in the project. However, the support letters discuss the petitioner's influence on individual projects and do not provide support to the claim that the petitioner's role was leading or critical to the organization or the establishment as a whole.

For example [REDACTED] producer for the independent film production company [REDACTED] which produced the film [REDACTED] states: "The main character in the movie is been [sic] played by [the petitioner], a versatile artist with skills in martial arts, ballet, modern dance and singing. [The petitioner] brings with her an enormous range of skills and was fundamental [sic] for the success of the movie." Mr. [REDACTED] while complimentary of the petitioner's contributions to a specific film, does not state that she had any impact to the organization at large, the production company.

The only claimed leading role that was not in connection with a specific acting project was the work the petitioner performed as a spokesperson for [REDACTED]. In the appeal brief, the petitioner claims that [REDACTED] is an internationally known cosmetic care company. However, there is no evidence in the record that substantiates her claims in this regard. Going on record without supporting evidence is insufficient. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). While the petitioner submitted documentation on *Snell System* that describes the system as being revolutionary, USCIS need not rely on the self-promotional material of the company. See *Braga v. Poulos*, No. CV 06 5105 SJO (C.D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009). Based on the evidence of record, it is not clear if [REDACTED] is one line of beauty products from an unnamed company or is the name of a cosmetic care company, as the petitioner asserts. Regardless, the record does not contain evidence that [REDACTED] is an organization or an establishment with a distinguished reputation. Even if the company does enjoy a distinguished reputation, the petitioner has not documented the impact of her role for that company, such as documentation of increased sales.

[REDACTED] director for the Italian television series [REDACTED] in which the petitioner played a lead acting role, writes: "[The petitioner] played the co-star role of [REDACTED] this character is full of colors and we needed a versatile talent and [the petitioner's] portrayal of the [REDACTED] served to keep viewers in suspense, making the series all the more interesting and popular. It has been a great choice for my team [to] have her in the [television] series." Mr. [REDACTED] discusses the petitioner's influence in the particular series. The petitioner on appeal characterizes her work in [REDACTED] as having a leading or critical role for [REDACTED] and for [REDACTED] the media group that owns [REDACTED]. The supporting documentation that the petitioner submitted regarding her work on the show does not indicate that her role impacted the success of the show at a level indicative of her critical role for [REDACTED]. For example, the record lacks evidence that [REDACTED]'s viewership increased with the introduction of [REDACTED]. However, even assuming that the submitted evidence is sufficient to establish that the petitioner, through the success of the series [REDACTED] performed a critical role for [REDACTED] or [REDACTED] the record supports the director's ultimate determination that the petitioner

has not established eligibility under this criterion because she has not submitted evidence demonstrating her performance in a leading or critical role for organizations or establishments (in the plural) that have a distinguished reputation, which is consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(K)(3)(ii)(B) that evidence of experience must be in the form of “letter(s).” Thus, the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS’ ability to interpret significance from whether the singular or plural is used in a regulation.³

Accordingly, the petitioner has not satisfied the plain language requirements under 8 C.F.R. § 204.5(h)(3)(viii).

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. 8 C.F.R. § 204.5(h)(3)(ix).

The director determined that the petitioner established this criterion. To satisfy this criterion, the petitioner submitted into evidence webpage printouts from a website that purportedly establishes the median actor’s salary in Italy. The petitioner also submitted multiple contracts in Italian for shows or projects that filmed in 2009, with accompanying translations. From 2009, the petitioner submitted a receipt from [REDACTED] TV showing a payment, along with an accompanying translation. The petitioner also submitted one bank statement from 2007 showing a one-time deposit, with an accompanying translation.

As noted in the earlier discussion of the criterion under 8 C.F.R. § 204.5(h)(3)(iii), the regulation at 8 C.F.R. § 103.2(b)(3) outlines the requirements for translations of foreign language documents that are submitted to USCIS as evidence. While not addressed by the director in his decision, the petitioner submitted translations that do not comport with the regulation. Instead, the translations are accompanied by a single blanket certification that does not identify any specific document. Because these translations do not comply with 8 C.F.R. § 103.2(b)(3), they have no probative value.

Moreover, even if the petitioner had met the translation requirements, the evidence submitted under this criterion still could not satisfy the plain language requirements because the petitioner has not submitted any supporting documentation that shows the reliability of the data from the online source that allegedly establishes the median salary of Italian actors. The submitted documentation relating to the website does not include even the most basic information, such as the internet address or URL of the site. Moreover, even if the petitioner provided additional evidence establishing the reliability of the information on the website, earning above the median income level is insufficient to satisfy the requirements of the regulation. At issue is how the petitioner’s income compares with high

³ See *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for “a” bachelor’s degree or “a” foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

salaries or significantly high other remuneration. The petitioner did not submit evidence of high income or significantly high other remuneration for actors in Italy.

Accordingly, the petitioner has not satisfied the regulatory requirements and the AAO withdraws the director's finding with regard to this criterion.

B. Summary

The petitioner has failed to submit sufficient relevant, probative evidence to satisfy the regulatory requirement of three types of evidence.

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian*, 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.⁴ Rather, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.* at 1122. The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁴ The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).